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EQUAL EDUCATIONAL OPPORTUNITY, CONSTITUTIONAL UNIFORMITY AND THE *DEFUNIS* REMAND

Arval A. Morris*

The object is to bring into action the mass of talents which lies buried in poverty in every country for want of means of development, and thus give activity to a mass of mind, which in proportion to our population, shall be the double or treble of what it is in most countries.

—Thomas Jefferson**

Education has been characterized by Horace Mann as the “great equalizer of the conditions of men—the balance wheel of the social machinery.”¹ It should provide Americans with a common intellectual background² and with equality of social opportunity.³ To achieve these ends there must first be afforded an equality of educational opportunity, and that task is primarily for the states to achieve within the framework of the state and federal constitutions.⁴ The purpose of this article is to set forth competing notions of equal educational opportunity, indicating which may be appropriate at the state and federal levels, and to review and comment on the inconclusive history of one case that involved the crucial question whether a state’s racially conditioned law school admissions program is consistent with a state’s

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** Letter from Thomas Jefferson to Mr. Correa, Nov. 25, 1817, in *THE WRITINGS OF THOMAS JEFFERSON* 94–95 (R. Washington ed. 1854).

1. *Twelfth Annual Report of Horace Mann as Secretary of the Massachusetts State Board of Education* (1848), in *DOCUMENTS IN AMERICAN HISTORY* (H. Commager ed., 4th ed. 1958).

2. As Justice Frankfurter put it, the public school is:

[t]he most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny.

Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 216, 231 (1948).

3. See, e.g., L. CREMIN, *THE GENIUS OF AMERICAN EDUCATION* (1965); Wilson, *Social Class and Equal Educational Opportunity*, 38 *HARV. EDUC. REV.* 77 (1968). But see C. JENCKS, *INEQUALITY* (1972).

4. It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.

Cooper v. Aaron, 358 U.S. 1, 19 (1958).

constitutional duty to afford equal educational opportunity—*DeFunis v. Odegaard*.⁵

I. CONSTITUTIONAL CONCEPTS OF EQUAL EDUCATIONAL OPPORTUNITY: STATE AND FEDERAL

Unlike many state constitutions,⁶ the United States Constitution, including its fourteenth amendment, does not explicitly guarantee that a state shall grant any resident school child the opportunity for an equal education in its publicly supported common schools.⁷ To the contrary, that amendment provides, *inter alia*, only that "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸ The duty, therefore, is one of negative content. Nevertheless, the Supreme Court of the United States repeatedly has interpreted the negative duty of the equal protection clause to include a guarantee of equal educational opportunity.⁹ For example, in one of the Supreme Court's most celebrated cases, *Brown v. Board of Education*,¹⁰ it declared that the opportunity for a public, common school education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."¹¹ The Supreme Court went on to hold that "segregation [by law] of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal deprive[s] the children of the minority group of equal educational opportunities."¹² Thus, the Court has clearly held in *Brown* and other

5. 82 Wn. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974), *subsequent disposition*, 84 Wn. 2d 617, 529 P.2d 438 (1974).

6. See, e.g., WASH. CONST. art. 9, § 1: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." See *Northshore School Dist. v. Kinnear*, 84 Wn. 2d 685, 530 P.2d 178 (1974); *Morris & Andrews, Ample Provisions for Washington's Common Schools; Northshore's Constitutional Promises to Keep*, 10 GONZAGA L. REV. 19 (1975) [hereinafter cited as *Morris & Andrews*].

7. Public school grades K through 12.

8. U.S. CONST. amend. 14.

9. See, e.g., *McLaurin v. Oklahoma*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

10. 347 U.S. 483 (1954).

11. *Id.* at 493.

12. *Id.* It is crucial to a proper understanding of *Brown* to note that the unconstitutional segregation was a consequence of "racial assignment" of pupils to various common schools.

cases, such as *San Antonio Independent School District v. Rodriguez*,¹³ that a resident school child has no federal constitutional right to a state provided education, but if the state does provide a system of public education, it must do so by making such education available on the basis of equal educational opportunity to all resident school children.¹⁴ The same is true of state-supported higher education.¹⁵

One of the most significant problems raised by the approach outlined above is that of identifying the proper meaning of "equal educational opportunity." The Supreme Court has never attempted to set forth a definitive statement of the concept, and scholarly and judicial opinions have differed as to content of the notion.¹⁶

A. Scholarly Definitions of Equal Educational Opportunity

Various formulations of the term "equal educational opportunity" have been offered. Each formulation implicitly or explicitly carries its own set of policy assumptions, and each would have significantly different consequences for the system of public common schools in the United States.¹⁷ The following formulations suggest that, assuming a reasonably diligent, hypothetical "average student," for purposes of the fourteenth amendment, "equal educational opportunity" exists if, and only if:

13. 411 U.S. 1 (1973). In *Rodriguez*, the Court held that "education is, of course, not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35.

14. The application of the fourteenth amendment is limited to the state-action circumstances that exist within the boundaries of a given state. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

15. See cases cited in note 9 *supra*.

16. See note 23 *infra*. Many of the differences probably exist because we are not sure of the proper meaning to be ascribed to the concept of "equality." See generally E. CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN*, 115-41 (1961); R. HARRIS, *THE QUEST FOR EQUALITY* (1960); S. LAKOFF, *EQUALITY IN POLITICAL PHILOSOPHY* (1964); Jarrett, *The Meanings of Equality*, in *THE CONDITIONS FOR EQUAL EDUCATIONAL OPPORTUNITY 3* (S. McMurrin ed. 1971); Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* 31 (R. Brandt ed. 1962).

17. For formulations dealing with the public common schools, see A. MORRIS, *THE CONSTITUTION AND AMERICAN EDUCATION* ch. 10 (1974); A. WISE, *RICH SCHOOLS, POOR SCHOOLS* (1972); Yudoff, *Equal Educational Opportunity and the Courts*, 51 *TEXAS L. REV.* 411 (1973). The formulations may be different still when dealing with higher education. For example, if *DeFunis* were upheld by the Court, the implicit (or explicit) concept of equal educational opportunity would be different from all of those delineated in the text because it would permit rationing educational resources and excluding of prospective students on the basis of race. See text accompanying notes 71-76 *infra*.

(1) an "outcome" standard can reasonably be achieved whereby each child is afforded the chance solely through state legislative funding on a state-wide basis to develop his or her talents and capacities to a legally prescribed minimum, adequate level of development,¹⁸ e.g., that level necessary for "good citizenship".

This standard could properly be advanced either by

(a) allocating differing amounts of state resources to each child in order to enable each child to achieve the legally prescribed minimum, adequate level, thereby assuming that children enter public school with different abilities,¹⁹ or

18. While not free of all doubts, the state-wide, minimum-adequacy standard seems to have been approved by the Supreme Court as constitutionally permissible. However, the Court has failed to state what level of state funding would be minimally adequate. Justice Powell's majority opinion in *Rodriguez* avoided this issue and fecklessly declared that courts under the equal protection clause would be:

well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 43 (1973). This minimum-adequacy view was tellingly countered by Justice Marshall: "One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient." *Id.* at 89. Finally, although Justice Powell's majority opinion used the "local control" argument to allow local disparities in spending and to avoid passing on the relationship between the cost of education and its quality, it appears inconsistent because the "local control" argument itself presumes that a relationship of some type exists between educational costs and its quality.

However, since *Rodriguez* was decided under the negative content approach to the fourteenth amendment, it is not determinative in state courts applying constitutional provisions, such as Washington's, that place an affirmative duty on the state "to make ample provision for education." These state constitutions require that state courts: (1) confront the affirmative formulation issues; and (2) probably use some version of a qualitative "outcome" standard of equality of educational opportunity. See the constitutional illustration and Morris & Andrews, *supra* note 6. Thus, litigants and courts must formulate a set of judicially manageable standards; state courts cannot simply declare that they "have neither the knowledge nor the means nor the power to tailor the public monies to fit the varying needs of . . . students throughout the State." *Burrus v. Wilkerson*, 310 F. Supp. 572, 574 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

19. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his [other] needs and abilities to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972). For discussion, see Comment, *The Right to Education for Mentally Retarded Children*, 43 U.M.K.C.L. REV. 79 (1974).

This approach is consistent with the United States Supreme Court's decision in

- (b) allocating equal resources to each pupil thereby assuming that all students enter public school with substantially equal abilities;
- (2) in addition to the "outcome" standard in (1), voluntary local taxation is authorized to provide resources for "enrichment" opportunities within a local school district. Depending upon the appropriate constitutional test, the additional resources must be locally distributed either
 - (a) unequally, in accordance with each pupil's educational needs, or
 - (b) equally, irrespective of each pupil's ability and capacity;²⁰
- (3) number (2) is required, except that voluntary taxation must be made available solely on a state-wide, rather than on a local, basis with distribution of the additional tax revenues on a state-wide basis in accordance with the standards of either (a) or (b) in (2);
- (4) distribution of educational resources is made unequally and solely according to a pupil's demonstrated merit and in a manner designed to maximize educational attainment ("outcome") by those pupils who are most capable of making the most beneficial use of the state's scarce educational resources;
- (5) the resources and educational opportunities necessary for each child to develop fully all of his or her human potentialities are made available unequally on a per pupil basis, up to a prescribed maximum age, *e.g. 16, regardless of race, creed, sex, social standing or geographic location within the state*;
- (6) an "input" standard is used under which all of the state's resources for education must be distributed equally on an individual, per-pupil basis irrespective of the innate or environmental background of the individual child;²¹ or

Lau v. Nichols, 414 U.S. 563 (1974) (school system must provide English language instruction to linguistic minorities), which was not decided on equal protection grounds. For a discussion of language problems in equal educational opportunities, see Grubb, *Breaking the Language Barrier*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 52 (1974).

20. It appears that the dissent in *Northshore School Dist. v. Kinnear*, 84 Wn. 2d 685, 731, 530 P.2d 178 (1974), tended toward an interpretation of WASH. CONST. art. 9, § 1 phrased along these lines. See also Morris & Andrews, *supra* note 6.

21. Justice Marshall seems to have approved this standard when, in dissent, he wrote that "the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the

(7) distribution of educational resources is made equally on a per-child, input basis (number (6) above), but, depending upon an individual court's requirements, if the state can show either a rational basis or a compelling state interest for doing so, it may classify its schoolchildren within groups. Each group may then be allocated a different amount of educational resources which it must use on an equal per-pupil basis within the group—all in order to achieve a legitimate state purpose.²²

The various formulations of equal educational opportunity briefly set forth above are not exhaustive.²³ They do, however, illustrate the complexity of definition and two of the primary categories: (1) those concepts of equal educational opportunity focusing on some kind of affirmative, qualitative "outcome"; and (2) those concepts focusing solely on resources and affirmatively requiring, or permitting, a particular set of "inputs." Most of the aforementioned concepts assume that a direct relationship exists between local school expenditures and the quality of educational opportunity.²⁴ This assumption if considered in its gross, common sense meaning is clearly valid for common school education.²⁵ For example, if a local school district lacks sufficient

children are able to do with what they receive." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 84 (1973). It would appear that his view derives from his focus on the elements, tangible and intangible, that were considered under the separate-but-equal doctrine. *Id.*; see cases cited in note 9 *supra*.

22. This standard and some of its variations are illustrated in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969), and *Thompson v. Engelking*, Civ. No. 47,055 (D. Idaho, Nov. 16, 1973). The court in *Thompson* stated that Idaho was not "obligated to insure that all districts have the same dollar inputs per pupil" because the "state may recognize differences in educational costs so long as the differences are based on relevant economic and educational factors." For discussion, see McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?* 38 LAW & CONTEMP. PROB. 415, 417 (1974).

23. Professor Arthur Wise, in 1968, suggested at least nine possibilities: (1) negative; (2) full opportunity; (3) foundation; (4) minimum attainment; (5) leveling; (6) competition; (7) equal dollars per pupil; (8) maximum variance ratio; and (9) classification. A. WISE, *RICH SCHOOLS, POOR SCHOOLS* 143-59 (1968). Although Wise's standards have been criticized as too vague, see Kirp, *Book Review*, 78 YALE L.J. 908, 915 (1969), courts have used them. See McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make A Difference?* 38 LAW & CONTEMP. PROB. 415 (1974).

24. See *Symposium—Future Directions for School Finance Reform*, 38 LAW & CONTEMP. PROB. 293-581 (1974).

25. This assumption is obviously valid for higher education where, in its important creative function, costly innovative research must be conducted by professors of distinguished abilities who, in turn, transmit their research findings to their students. This

funds for a chemistry laboratory and a chemistry teacher, the quality of that local district's educational opportunity is diminished.²⁶ Clearly, there is a minimum per-pupil expenditure level, constantly fluctuating in relation to local economic circumstances, that bears a direct relationship to the quality of educational opportunity offered by a state.

The existence, however, of the cost-quality assumption has been challenged in its refined and incrementally additional expenditure sense, *i.e.*, that in most instances a direct relationship exists between each additional dollar of common school financing and the quality of educational opportunity.²⁷ The most recent study of educational cost-quality data, done by a federal reserve bank,²⁸ focused on cognitive achievement in the Philadelphia schools. It concluded that:

statement, of course, is not meant as an endorsement of each and every item of past university research as having been either properly priced or worthwhile.

26. For discussion, see Morris & Andrews, *supra* note 6, at 76-78.

27. *Id.* at 75-85. It was the failure to prove this latter point, *inter alia*, which doomed petitioner's recent challenge to Washington's school finance system in *Northshore School Dist. v. Kinnear*, 84 Wn. 2d 685, 530 P.2d 178 (1974). See Morris & Andrews, *supra* note 6, at 39-59. Petitioner's burden of proof was a heavy one. In fact, a recent reanalysis of the famous Coleman report, OFFICE OF EDUCATION, U.S. DEPT OF HEALTH, EDUCATION & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966), indicates that statistical analyses of school expenditure levels beyond the minimum required by common-sense fail to reveal the existence of a direct relationship between the additional dollars spent and incrementally higher levels of student achievement. See, *e.g.*, ON EQUALITY OF EDUCATIONAL OPPORTUNITY (D. Moynihan & F. Mosteller eds. 1972). Concerning whether education is truly a means for eliminating social inequality in American society, see C. JENCKS, INEQUALITY (1972).

28. Summers and Wolfe, *Which School Resources Help Learning? Efficiency and Equity In Philadelphia Public Schools*, FEDERAL RESERVE BANK OF PHILADELPHIA BUSINESS REV., Feb. 1975. In this sophisticated piece of research, the authors carefully examined the records of 1,896 pupils, matching them with their teachers, and used standardized, cognitive tests as the measure of achievement growth, characterizing it as an "output" measure. They then sought, by statistical methods, to assess the impact of "input" variables on the achievement growth of the pupils over time. The major finding that emerges from this study is "that certain school inputs do make a difference in [student] achievement growth." *Id.* at 18. This finding gives rise to three major policy implications: (1) "public school resources can be used to attain greater equity in educational opportunity"; (2) some "[s]chool inputs produce greater achievement growth than others. Thus, shifting resources toward those inputs could generate a larger educational output without raising School District expenditures"; and (3) "if achievement growth is accepted as a principal goal . . . taxpayers, parents and courts could hold school administrators accountable." *Id.* 19-21 (emphasis omitted). A full summary of the findings follows:

1. All types of students at all levels of schooling experience larger rates of growth in achievement if they are attending more, and if unexcused absences and lateness are minimized. Regarding these attendance features as important signals and effectively reacting to them will result in increased learning. Reducing the amount of serious disruptions in schools will increase learning—resources directed to this problem has a direct payoff.

- (1) additional dollars spent for "compensatory" counseling and remedial education do not appear to produce higher educational achievement among low-income and low-achieving students;
- (2) a school's physical facilities, so long as minimally adequate, do not affect student achievement;
- (3) the most experienced teachers produce the most learning growth in their pupils, except in the case of low-achieving elementary

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2. All types of students in elementary school do better if they are taught by teachers who graduated from higher-rated colleges, if they are in a school with a 40-60% Black student body, if they are in classes of 33 or less, and if they are in a school with more high achievers.
 3. All types of students in junior high school do better if they go to a school which is part of an elementary school, if they have social studies teachers who graduated from higher-rated colleges, if they have mathematics teachers who were trained in the post-Sputnik New Math era, if they are in classes of 31 or less, and, again, if they are in a school with more high achievers.
 4. All types of students in senior high school do better if they are in smaller schools where dropouts are less of a problem.
 5. Disadvantaged as well as advantaged students are helped by all these factors, but they can be helped even further by particular types of resources being targeted to them.
 6. Black students with high IQs would benefit if home and school would allow them to achieve as much as non-Black students with the same high IQ, especially in the early grades. Later on is too late—Black and non-Black students with the same third grade achievement levels grow at the same rate in the higher grades. Black students perform better in smaller elementary schools and in junior highs with larger Black populations.
 7. Low-income students respond particularly well to elementary school teachers who graduated from higher-rated colleges and to junior high classes smaller than 32.
 8. Low achieving students are particularly responsive to certain school inputs. In elementary school, low achievers do better if they are in classes with less than 28 students, if they have new teachers, and if they are in schools with more high achievers. In junior high, this group performs better with new English teachers and with more high achievers in the school. And in senior high this group responds to English classes that have less than 27 students and to smaller schools. Presumably, at every level, a redesigned remedial education program—since the present one does not seem to be helping low achievers—would be helpful.
 9. High achievers do best with experienced elementary school teachers and junior high English teachers, junior high social studies teachers from higher-rated colleges, more library books, and with senior high English teachers with higher English exam scores. If they are in an environment with less disruption and fewer dropouts, and if they move less during their junior high years, they do better.

See also A. Summers & B. Wolfe, *Intradistrict Distribution of School Resources To The Disadvantaged: Evidence For The Courts*, 1974 (Federal Reserve Bank of Philadelphia Research Paper); A. Summers & B. Wolfe, *Equality of Educational Opportunity Quantified: A Production Function Approach*, 1974 (Federal Reserve Bank of Philadelphia Research Paper); Summers, *Equity In School Financing: The Courts Move In*, FEDERAL RESERVE BANK OF PHILADELPHIA BUSINESS REV., Mar. 1973, at 3.

pupils who appear to benefit most from newer teachers (perhaps because such teachers bring an undampened enthusiasm to the classroom);

- (4) a teacher's score on the National Teachers' Examination seems unrelated to his or her performance as a teacher;
- (5) although the quality of a teacher's undergraduate college or university experience affects student achievement, the amount of education beyond the bachelor's degree does not appear related to pupil achievement;²⁹ and
- (6) the race of a pupil's teacher is unrelated to student achievement.

The report recommends, *inter alia*, that teacher salary scales be revised and made more reflective of teacher facilitation of student learning, and that, since the quality of a teacher's undergraduate college or university education is related to student achievement and growth, the quality rating of a teacher's college or university should be used as an element in the hiring decision. The overall conclusion to be drawn from this and similar social science research is the familiar one that school tax dollars can be spent wisely or unwisely, depending on whether the order of spending priorities support those factors that help maximize student achievement.³⁰

On the other hand, conclusions drawn as a result of such studies are often of questionable validity. First, the test of student achievement generally used to measure educational output which, in turn, is then related to educational costs, is almost always a standardized test measuring only some, but not all of the cognitive dimensions of a student's learning, *e.g.*, mathematical or reading skills.³¹ Generally, no

29. This controversial finding should be evaluated. It probably says more about the type of graduate education to which teachers are generally subjected than about graduate education itself. To my mind the question turns, at least in part, on the nature and quality of the graduate education. If a first-grade teacher takes graduate courses in advanced physics or some other unrelated area, I cannot see how the graduate education would help the first-grade teacher perform. Even a senior high school physics teacher would reach a point in graduate physics education where his or her additional learning of physics would be of little or no value to his or her students because it was so advanced there would be no possibility of it being communicated to high school students nor of affecting the way in which other material is transmitted. Nevertheless, in this second case, I believe that in the beginning the advanced education in physics would be beneficial, all other things being equal.

30. For a proposed Educational Accountability Act drafted in terms of student achievement, see Morris & Andrews, *supra* note 6, at 93-107.

31. Testing theory is discussed in A. ANASTASI, *PSYCHOLOGICAL TESTING* (3d ed. 1968), and L. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* (3d ed. 1970).

tests are used to measure a student's development of emotional faculties, such as self-esteem, interpersonal abilities, maturity, political socialization and good citizenship, which obviously constitutes "achievement." Nor are tests generally used to measure the psychomotor dimensions of a student's learning which are so important in the development of vocational skills.³²

Second, there is the problem of validity, *i.e.*, does the achievement test actually measure that which it seeks to measure?³³ For example, suppose a reading comprehension test is administered to each of two second-grade pupils of otherwise equal ability—one coming from a family background that emphasizes and reinforces the desirability of and need for reading and the other coming from a family background that is indifferent or hostile to reading, but encourages television viewing. Would a difference in the pupil's two reading scores reflect their home backgrounds or their learning achievement in school? Suppose the reading selection used in the standardized achievement test involved information about a subject that previously had been much portrayed on television and repeatedly seen by one pupil but not the other? Moreover, not all of the social science research is negative on the cost-quality relationship. Some of it, especially the more sophisticated variety, like that of Philadelphia's Federal Reserve Bank, has found positive relationships between school expenditures and student achievement.³⁴ Given the questionable validity of many of the studies and the conflicts in conclusions among them, it cannot be expected that social science will definitively resolve the precise problem of the relationship of educational finances to a state's legally denying or affording a student an equal educational opportunity.³⁵ Indeed, it has

32. Moreover, the lack of exact overlap between standardized achievement tests and educational purposes of a school, and the variance in educational purposes among schools, has many dimensions and can become a severely limiting factor on much of the social science research since per-pupil input costs include costs for items, *e.g.*, per diem and other allowances for school board members, litigation costs, salaries for superintendents, principals or vice-principals, counselors and clerks, that bear no direct or reasonable relationship to the cognitive skills that are measured. Furthermore, even if there is an exact overlap, it may be vitiated if the administration of the tests produces confusion in the minds of students.

33. For discussion, see C. SELLITZ, M. JAHODA, M. DEUTSCH, S. COOK, *RESEARCH METHODS IN SOCIAL RELATIONS* 154-86 (1959).

34. See, *e.g.*, Guthrie, *A Survey of School Effectiveness Studies*, in OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *DO TEACHERS MAKE A DIFFERENCE?* 25 (1970).

35. Cf. Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150, 157-58, 167 (1955).

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been suggested that this problem is uniquely legal, incapable of resolution by social scientists:³⁶

For purposes of litigation on the issue of educational inequality, social science output research arguably can be deemed legally irrelevant Under the equal protection clause, the concern is whether government treats people equally. Where equality and equal protection analysis are concerned, the focus is upon the rationality and fairness of how government distributes benefits, not with what people do with those benefits. Input-output research is irrelevant to that inquiry. Before deciding that education itself is irrelevant, which is the logical result of saying dollars do not make a difference, important avenues of improvement must genuinely be exhausted. Until this is done, this society should not mortgage away tomorrow's human capital—and certainly not on the basis of exploratory research findings more defective than informative.

B. Affirmative and Negative Judicial Definitions of Equal Educational Opportunity

All of the formulations of equal educational opportunity mentioned thus far define "equal educational opportunity" in terms of one or more positive features, thereby giving an affirmative meaning to the concept. Litigation about educational opportunity indicates that this approach might be necessary since the wording of state constitutions often defines equal opportunity affirmatively.³⁷ Naturally, emerging state constitutional law definitions of equal educational opportunity will not be uniform among the states, but rather will represent a multiplicity of approaches developed to fit varying state constitutional contexts.³⁸

36. McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?* 38 LAW & CONTEMP. PROB. 415, 432-33 (1974).

37. See, e.g., note 6 *supra*.

38. Should an "outcome" formulation be required by a state constitutional provision, it would probably lead to some kind of educational accountability scheme cast in terms of student learning. Besides legislation, see Morris & Andrews, *supra* note 6, at 93-107, litigation may be available. For example, a unique complaint was filed last year in California's Superior Court against the San Francisco Unified School District and various of its officers, teachers and employees. Plaintiff, Peter Doe, graduated from high school in the spring of 1972. School records indicate that he is Caucasian, of average or slightly higher intelligence and has never been in any serious disciplinary trouble. He maintained an average attendance record throughout the course of his school career and received average grades. While Peter was enrolled in the public schools, his parents made repeated attempts to secure accurate information about his educational progress. In response to these inquiries, school employees offered assur-

The task for state court judges is a complex one. Efforts by the United States Supreme Court to construe the due process clause of the fourteenth amendment³⁹ in affirmative terms have not yielded positive guidelines.⁴⁰ The complexity and variety of inconsistent and competing human aspirations frequently make an affirmative construction of the due process clause that can be useful in resolving one group of conflicting interests almost unserviceable in resolving a differing set of conflicting interests. Use of an undeviating equal-educational-opportunity formula in all cases may fail to strike the appropriate balance and may leave the parties and observers feeling a deep "sense of injustice."⁴¹ Such use may also fail to show proper appreciation for educa-

ances that Peter was performing at or near grade level and that no special, remedial or compensatory instruction was necessary. Shortly after graduation, Peter's parents had him examined by two reading specialists who separately concluded that the young man was a functional illiterate; that is, he had a reading and writing ability of approximately fifth-grade level at the time of his graduation from high school. The plaintiff could not, for example, read a job application or fill out the forms an auto accident might require; he felt inadequate to hold any job in which reading was demanded. Peter's parents filed a private damage claim charging school officials with:

- (1) Negligence (educational malpractice);
- (2) Misrepresentation; and
- (3) Breach of statutory duties to (a) keep parents accurately advised as to the educational progress of their children; (b) educate plaintiff and other students with the basic skills of reading and writing; (c) grant a diploma or graduation from high school only to pupils who meet minimum standards of proficiency in basic academic skills; (d) inspect and revise the curriculum and operation of the schools to promote the education of its pupils; and (e) design the course of instruction to meet the needs of the individual pupils.

For a fuller discussion of these and other possible theories, see Saretsky, *The Strangely Significant Case of Peter Doe*, 54 PHI DELTA KAPPAN 589 (1973); Abel, *Can a Student Sue the Schools for Educational Malpractice?* 44 HARV. L. REV. 416 (1974). Since graduation, Peter has been receiving private tutoring and has significantly improved his reading level: two grades in 8 months. No decision has been reached in the case.

In a similar case, a senior at the University of Bridgeport sued for a refund of tuition claiming that a course in "Methods and Materials in Teaching Basic Business Subjects" which she was required to take was "worthless." TIME MAGAZINE, Mar. 3, 1975, at 73.

39. U.S. CONST. amend. XIV. For a history of the language "due process of law" and "the law of the land," see R. MOTT, *DUE PROCESS OF LAW* chs. 1-5 (1926).

40. See, e.g., this language from *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926): The due process clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the land."

Justice Cardozo spoke of "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Mass.*, 291 U.S. 97, 105 (1934). See also Justice Frankfurter's statement in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951).

41. See E. CAHN, *THE SENSE OF INJUSTICE* (1950); Cohen, Book Review, 63 HARV. L. REV. 1481 (1950).

tional principles. It should be remembered, however, that when state judges define the affirmative elements of "equal educational opportunity" under their state constitutions, they do so not because they have special, professional expertise in educational affairs, but rather because, as Chief Justice Marshall stated, "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁴²

Although state courts may be required by their respective constitutions to construct affirmative definitions of "equal educational opportunity," they must also meet the requirements of the equal protection clause of the fourteenth amendment which defines the term negatively. It may be that the Supreme Court of the United States need not, and will not, try to give the term affirmative content.⁴³ The Court has yet to define the term comprehensively, and it is unlikely that it will do so.⁴⁴ It is not critical that the Court may continue to take a negative rather than an affirmative approach to the content of the term, or that it may produce different verbal formulae of "equal educational opportunity" when resolving conflicts in differing types of educational circumstances. It is critical, however, that the verbal formulae that are developed "be genuinely principled, resting with respect in every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."⁴⁵

To date, the Court has interpreted the duty that the equal protection clause places on the states regarding equal educational opportu-

42. *Marbury v. Madison*, 5 U.S. (1 Cranch) 49, 70 (1803).

43. This is based, presumably, on the ground of a lack of judicially manageable standards. Defining affirmatively the constituent elements of the equal educational opportunity required by the equal protection clause is an especially hazardous undertaking for the Court where no consensus exists on the proper role of schools in American society and where educators, themselves, have not satisfactorily defined the concept. See Coleman, *The Concept of Equal Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968). As one district court stated in *McInnis v. Shapiro*, 293 F. Supp. 327, 332 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969), an equal educational opportunity standard involves "a basic policy decision more appropriately handled by a legislature than a court." Another district court stated in *Burrus v. Wilkerson*, 310 F. Supp. 572, 574 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970), that "courts have neither the knowledge nor the means nor the power to tailor the public monies to fit the varying needs of . . . students throughout the State."

44. This is probably why J. Coons, W. Clune & S. Sugarman in their book, *PRIVATE WEALTH AND PUBLIC EDUCATION* 3 (1970), proposed a negative rule of fiscal neutrality, i.e., that spending for a child's public financed education should not be a function of local school district assessed wealth. See Coons, "Fiscal Neutrality" After *Rodriguez*, 38 LAW & CONTEMP. PROB. 298, 300 (1974).

45. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

nity to have solely a negative content.⁴⁶ This duty of negative content is illustrated by *Brown v. Board of Education*,⁴⁷ in which the Court held that a state could not constitutionally use race as a ground for assigning pupils to public schools where such assignment resulted in segregation. To do so would be a violation of equal educational opportunity.

It is convenient for the Court to interpret the term "equal educational opportunity" negatively because "persistent and difficult questions of educational policy" lie in this "area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels," and because "[e]ducation, perhaps even more than Welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'"⁴⁸

The Court will probably reaffirm this negative approach when it decides the constitutionality of a state university admission program based on race or sex. The question will be whether a racially conditioned affirmative action⁴⁹ program of student admissions denies

46. To the extent that the Supreme Court has considered the question, it has focused on the critical notion of "equal access" to school resources; this is closer to requiring an "input," rather than an "outcome" standard. The Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), was concerned with the lack of access of a Black law student to a share of state resources for legal education substantially equal to the share available to whites. The same Court harbored a similar concern in *Keyes v. Denver School Dist.*, 413 U.S. 189 (1973), *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Court has exhibited the same focus on "access" in other areas. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voting); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigents access to the criminal law processes).

47. 347 U.S. 483 (1954).

48. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973), quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

49. The term comes from labor relations. See, e.g., Labor Management Relations Act, § 10(c), 29 U.S.C. § 160(c) (1970). In education, courts have authorized and/or ordered school administrators to use numerical quotas in order to increase minority group representation at white schools. See Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 Wisc. L. REV. 257. The constitutionality and desirability of preferential treatment for minority groups has been discussed by B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*; DeFunis v. Odegaard, 49 WASH. L. REV. 1 (1973); Bell, *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 (1970); Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65 (1969); Elden, "Forty Acres and a Mule" With Interest: *The Constitutionality of Black Capitalism, Benign School Quotas, and Other Statutory Racial Classifications*, 47 J. URBAN L. 591 (1969); Vieira, *Racial Imbalance, Black Separatism, and Permissible Classifications by Race*, 67 MICH. L. REV. 1553 (1969); Hughes, *Reparation for Blacks?* 43 N.Y.U.L. REV. 1063 (1968); Wright, *The Role of the Supreme Court*

equal educational opportunity. The Court was confronted with such an affirmative action⁵⁰ program in the nationally popularized case,⁵¹ *DeFunis v. Odegaard*.⁵² But, as is well known, it declined to decide the merits.

II. THE *DEFUNIS* MOOTNESS "NON-DECISION"

A. Introduction

Marco DeFunis, Jr. sued then President Charles E. Odegaard and other officials of the University of Washington on the ground, *inter alia*, that DeFunis' failure to obtain admittance to Washington's only state law school, which by law has a limited total enrollment,⁵³ was the result of unconstitutional racial discrimination. The law school's minority admissions program is unique in that it specially and separately considers applications from persons self-characterized on their application forms (no interview is required) as Black, Chicano, American Indian or Philippine American,⁵⁴ and automatically grants those applicants considered capable of adequately completing the program

in a Democratic Society—Judicial Activism or Restraint? 54 CORNELL L. REV. 1 (1968); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966). Compare Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 3 BLACK L.J. 232 (1974), with Bell, *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 3 BLACK L.J. 241 (1974). See also Symposium—*DeFunis: The Road Not Taken*, 60 VA. L. REV. 917–1011 (1974); Redish, *Preferential Law School Admission and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A.L. REV. 343 (1974).

50. "Affirmative action" can refer to at least two different types of programs, *i.e.*, one of *preference* for certain minority group members which results in denying an opportunity to a Caucasian or one of *search* programs designed to expand the pool of job applicants or admission candidates none of whom is given a final preference. See Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Comment, *Race Quotas*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973).

51. See, *e.g.*, Coleman, *Quotas, Race and Justice*, N.Y. Times, Mar. 17, 1974 at 15, col. 4; Comer, *Quotas, Race and Justice*, N.Y. Times, Mar. 17, 1974, at 15, col. 3; Lewin, *Which Man's Burden*, THE NEW REPUBLIC, May 4, 1974, at 8; Lewis, *The Legality of Racial Quotas*, N.Y. Times, Mar. 3, 1974, § 4, at 5, col. 4; TIME, May 6, 1974, at 75. The case also proved popular with lawyers because 26 amici curiae briefs were filed with the Supreme Court.

52. 82 Wn. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974). For discussion see Symposium, *DeFunis: The Road Not Taken*, 60 VA. L. REV. 917–1011 (1974); Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A.L. REV. 343 (1974).

53. 82 Wn. 2d at 15, 507 P.2d at 1172.

54. It was argued that this process was highly susceptible to fraud. In fact, however, no evidence was presented to indicate that the process had been abused.

of law study a decisive preference in admissions.⁵⁵ This preferential type of affirmative action program has the consequence, in a law school with limited enrollment, of denying admission to some Caucasian applicants who, judged by the same admissions criteria except for the racial criterion, present stronger academic records and higher probabilities for successful completion of their legal studies.⁵⁶ Presumably, DeFunis was such a person.⁵⁷ He argued that in the context of the limited enrollment situation, the law school's policy of separately evaluating minority group applicants and weighing the set of admissions standards differently in regard to them,⁵⁸ denied him equal protection of the laws.⁵⁹

After trial, the Superior Court for King County, Washington, held for DeFunis and granted injunctive relief by which he was enrolled in the law school. This holding was later reversed by the Washington Supreme Court, basically on the ground that the law school's admission program furthered the state's compelling interest in promoting racial integration in education, including higher education.⁶⁰ Thereafter, Justice Douglas issued an order staying the Washington Supreme Court decision pending consideration of the issues by the Su-

55. Minority applicants were never compared with non-minority applicants, and other minority group members, such as Asian-Americans, were not given any special treatment or preference because "a significant number" could compete successfully with Caucasians and satisfy the general standards for admissions. 82 Wn. 2d 11, 37, 507 P.2d 1169, 1184 (1973).

56. See Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard*, 49 WASH. L. REV. 1 (1973). Compare Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

57. DeFunis was found "admittable" by the law school, but was not admitted. His name was placed on a waiting list, while a number of the above-characterized minority-group applicants with lower admission's qualifications were admitted. Later, DeFunis was notified that he would not be admitted because the first-year class had been filled. 82 Wn. 2d at 21-23, 507 P.2d at 1176-77.

58. The Chairman of the Admissions Committee testified that the same standard, relative probability of successful law study, was applied to all candidates, but when judging the probability of success of minority group applicants, the Committee gave less weight to Law School Admission Test scores and undergraduate grade point averages. 82 Wn. 2d 11, 21, 507 P.2d 1169, 1175-76. Justice Douglas noted that on oral argument the Law School conceded that "were the minority applicants considered under the same procedure as was generally used, none of those who eventually enrolled at the law school would have been admitted." 416 U.S. 312, 325 (1974) (Douglas, J., dissenting).

59. DeFunis' claimed right was a personal one, for as the Supreme Court held in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938): "It was as an individual that he was entitled to the equal protection of the laws"

60. 82 Wn. 2d 11, 507 P.2d 1169 (1973).

preme Court of the United States.⁶¹ At the time of the oral argument before the United States Supreme Court, DeFunis probably had enrolled for his ninth, and presumably final, quarter, although that quarter had not yet begun.⁶²

B. *The Mootness Decision and Its Underlying Rationale*

By a 5-4 decision, the Court held, per curiam, that it would not decide the merits of the case because it was moot: DeFunis clearly could, and would, complete his legal education. The court then vacated and remanded the case to the Washington Supreme Court.⁶³ The Court noted that DeFunis' action was not a class action and that the issue that he individually presented would not, as to him, be "ca-

61. 416 U.S. 312, 315 (1974). This stay, of course, had the effect of permitting DeFunis to remain in law school and continue his studies.

62. See *id.* at 316.

63. 416 U.S. 312 (1974). The Attorney General for the State of Washington, arguing the mootness question on behalf of the law school, stated during his oral argument:

"MR. GORTON: As far as Mr. DeFunis is concerned, the time for registration for the final quarter of his law school began on February 20th, it ends on March 1st, the day after tomorrow.

"On Thursday, when we left, he had picked up his application forms; he may or may not, Mr. Justice Marshall, have filed them. He certainly will have by Friday.

"He would—even if he had been required to ask readmission, he would have been granted that readmission, assuming that he was acceptably performing his law school studies; which he is

"Once he has registered on the—no later than the 1st of March, there will be—he will then complete his law school studies, assuming he passes his courses in the last semester.

"The only discretion which would then remain in the law school would be if he failed the course in his last semester [sic], and requested special permission to come back in the fall to make up for it, in which case, of course, he'd be in exactly the same position as any other student who had failed would be.

"QUESTION: What if a decision of this Court came down, say, on May 1st, affirming the judgment of the Supreme Court of Washington, what would the Board of Regents do with the petitioner? [Spring quarter examinations would not begin until about May 30.]

"MR. GORTON: Nothing. He would—assuming he passes his courses, he would receive his degree, and he would take his bar examination"

Transcripts of Oral Argument Before the Supreme Court, 3 BLACK L.J. 249, 258 (1974). On mootness, see Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974); Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430 (1973); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970); Comment, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 COL. L. REV. 867 (1965); Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77 (1955); Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946).

pable of repetition, yet evading review."⁶⁴ The mootness holding appeared to turn on the facts that DeFunis had registered for his final quarter of law school; that the Washington State Attorney General had represented that the law school and the University would not move against DeFunis if, in mid-quarter, the Court ruled against him;⁶⁵ that DeFunis' was not a class action;⁶⁶ and that the Washington Supreme Court had already ruled on the question—thus a later case could be expedited.⁶⁷

The majority's willingness to hold the case moot may have also rested in part on the fact that the constitutional question presented in *DeFunis* was particularly complex.⁶⁸ The Court had little case experience on which to rely since easier cases involving racially conditioned affirmative action programs in state university admissions had not been previously decided by the Court or by many lower courts. Easier affirmative action questions are presented where the state body ac-

64. 416 U.S. at 318-19, quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The *Southern Pacific* rule, which allows review of cases "capable of repetition, yet evading review," has generally been applied in class actions where the group interest of the class can continue to be adequately represented by the named plaintiff even though he or she may have lost an interest in the outcome. See, e.g., *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); Comment, *Mootness in the Supreme Court*, 88 HARV. L. REV. 373, 386-88 (1974).

65. This fact removed or severely diluted the ripeness and adverseness of the case.

66. 416 U.S. at 317.

67. *Id.* at 319.

68. In *Morton v. Mancari*, 417 U.S. 535 (1974), a unanimous Supreme Court upheld a congressional statute granting American Indians, i.e., "members of federally recognized tribes," a decisive preference in hiring for employment in the Bureau of Indian Affairs (BIA). The non-Indian applicants, situated similarly to DeFunis, complained, but the Court upheld the statute. The decisive preference was held to be "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. Moreover, the Court found that "the preference [was] not directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.* at 553 n.24.

Presumably, the meaning of the Court's distinction is that either there is a constitutional rule against racial preferences or, if not, a case like *DeFunis* is different in principle from *Morton*. The transparency of the Court's analysis is obvious. Before an Indian can qualify for the preference, he or she must first be an American Indian, and secondly, one who is a "member of a federally recognized tribe." While the second requirement may be characterized as political, the first is racial. Indeed, "Indians can only be defined by their race," and "if legislation is to deal with Indians at all, the very reference to them implies the use of a 'criterion of race.'" *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965) (three-judge court), *aff'd per curiam*, 384 U.S. 209 (1966); see *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971) (upholding classification of Indians by race); L. MORRIS, *HUMAN POPULATION, GENETIC VARIATION AND EVOLUTION* (1971); S. GARN, *HUMAN RACES* (3d ed. 1971).

tively seeks minority persons to expand the numbers of an underlying pool from which selection is made without the ultimate selection decision being racially conditioned, or even when the program grants a decisive selection preference on racial grounds to a person who is correctly deemed, by whatever relevant criteria, to be as fully and equally qualified as are the other candidates, since not all of the equally qualified candidates can possibly be selected due to an insufficient number of available positions. By contrast, in *DeFunis* all candidates were at least minimally qualified, but, presumably, a range of unequally qualified candidates constituted the underlying pool and a decisive selection preference was granted on racial grounds to the lesser qualified candidates. As a consequence, better qualified candidates were not admitted because an insufficient number of positions were available.

Despite these complexities, one questions why the *DeFunis* problem was so difficult for the Court. In *Swann v. Charlotte-Mecklenburg Board of Education*,⁶⁹ the Court declared that, after a violation of the principle of *Brown v. Board of Education*⁷⁰ has been found, the local school board may be compelled to use race as a criterion in student assignments in order to achieve the constitutionally required goals of desegregation and unitary public education. Although it appears that racial assignment to a public school is unconstitutional when it results in segregation, *Brown* and its progeny leave open the question of whether, absent a court finding of invidious discrimination, it is constitutionally permissible for state university officials voluntarily to use race as a criterion in admitting students. Yet *Swann* appears to indicate that they can.⁷¹ Why, then, should *DeFunis* prove to be so much more difficult for the Court than *Swann*?

The critical factor that distinguishes *DeFunis* from *Swann* is the difference between the public, common-school educational system and that of higher education.⁷² Under the student assignment scheme in

69. 402 U.S. 1 (1971); accord, *United States v. Montgomery Bd. of Educ.*, 395 U.S. 225 (1969).

70. 347 U.S. 483 (1954), *aff'd on rehearing*, 349 U.S. 294 (1955).

71. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). The Supreme Court approved the district court's setting a goal for racial balance of 71-29, reflecting school population, so long as the ratio was taken as a goal and not a constitutional command. See Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

72. The fact that neither the University of Washington nor its law school has practiced racial discrimination in past student admissions does not appear decisive. Although *Swann* involved the elimination of past racial discrimination, a line of

Swann, all students remained in the common school system, not one was excluded from the public schools. Therefore, assuming schools of substantially equal quality, there was no denial of equal educational opportunity. In contrast, a necessary consequence of using a racial criterion in the context of *DeFunis*, with its limited number of law school positions,⁷³ is that some innocent third parties are excluded from law study solely on the basis of race. Thus, *DeFunis* is not a case of racial assignment, like *Swann*; rather it is a case of voluntary state action designed to produce racial integration based on the use of a racial preference. The University of Washington Law School is engaged in rationing scarce, higher educational resources to applicants solely on the criterion of race. Rationing state resources on the basis of race is, under Supreme Court precedents, arguably a deprivation of equal educational opportunity.⁷⁴

It is this factor, the element of scarcity, that makes the constitu-

lower court cases has consistently allowed school officials to use race as the ground for making student assignments when such assignments furthered integration rather than segregation. See, e.g., *Offerman v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967). Indeed, the Supreme Court in *Chropowicki v. Lee*, 402 U.S. 935 (1971), summarily affirmed a three-judge, federal district court judgment holding unconstitutional New York's anti-busing law which denied local school officials the power to base school assignments on race in order to achieve integration. See also *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (North Carolina antibusing statute declared unconstitutional). Thus, it is difficult to believe that the absence of a prior court holding of past racial discrimination would be a critical factor in resolving *DeFunis'* constitutional question. It appears that state officials under an affirmative action program can voluntarily, without a prior court holding of racial discrimination, use race as the basis of assigning students to public schools in order to achieve integration.

Moreover, even if the law school or the University of Washington had practiced racial discrimination in the past when admitting students, that fact alone would probably not be sufficient to solve the equal protection problem presented in *DeFunis*. Any theory seeking to justify the law school's program as compensation for past discrimination is defective because it fails to make the "wrongdoer" pay the compensation. *DeFunis*, and others similarly situated, were innocent persons who were in no way responsible for, or involved in, the assumed past racial discrimination. The theory that, assuming past racial discrimination, the law school's admissions program can be justified as a means of overcoming the resistance of those potential applicants from the previously disfavored race by providing new incentive to apply for law school admission is equally defective because of its blunderbuss approach. The theory fails to meet the constitutional requirement that before race can be used as an admission criterion by state officials, there first must be a finding that no less restrictive alternatives are available to achieve the same end. For collected cases and discussion, see Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, And Some Criteria*, 27 VAND. L. REV. 971, 995-1011 (1974). Obviously, there are other reasonable programs available, e.g., special minority recruitment programs.

73. See note 53 *supra*.

74. See cases collected in notes 9 & 46 *supra*.

tional question presented by *DeFunis* so much more difficult than that presented by *Swann*. This factor causes exclusion on the basis of race and necessarily produces an element of unfairness to innocent parties, such as *DeFunis*, clouding perceptions of the path to achievement of one of the basic goals of American society, namely, a just and integrated society.⁷⁵ It is also this factor, scarcity, that creates our current dilemma: Looking at our social order honestly and realistically, either law schools and universities will *not* use race as an element in their admissions policies, with the most likely consequence of excluding that group at the bottom of the social order which is largely composed of certain minorities and thereby depriving them of educational opportunities; or law schools and universities *will* use race decisively in affirmative action admissions programs and thereby make educational opportunities equally available for certain minority groups but with the sad consequence of engaging in the nasty business of racial discrimination against innocent parties.⁷⁶ Thus, *DeFunis* presented a most difficult problem. In sum, I believe the Court's lack of prior case experience on which to rely and the overall difficulty of the question in *DeFunis* played at least some part in the Court's mootness decision.

75. Racial integration is indeed a deep and powerful interest. It is not, however, an interest compelling in the sense that, to serve it, any steps are justified. Integration does not, as an objective, justify racial discrimination believed useful in its achievement. Lawyers, judges and prosecutors of all colors and ethnic identities we do need; but we cannot afford to pay for improvement on that front by basing professional qualifications partly on skin color. A community is not justified in advancing its own general health by denying to some of its members constitutional protections that apply to all. It is because the classification of persons by irrelevant, physical properties is so generally odious that the courts are explicit in demanding that the interests served by such classification be literally compelling, overriding. Grave though the need for integration is, overriding in the sense required by the judicial test proposed it is not.

Cohen, *Race And The Constitution*, THE NATION, Feb. 8, 1975, at 135, 142.

[P]referential programs are fundamentally counter-educative on the basic issue of racial discrimination itself. Instead of helping to eliminate race from politics, they inject it. Instead of teaching tolerance and helping those forces seeking accommodation, they divide on a racial basis. Such programs tend to legitimate the back-lash by providing it with much of the philosophical and moral base from which the civil rights movement itself began.

Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovorn*, 34 U. CHI. L. REV. 817, 854 (1967). "Any legal classification by race weakens the government as an educative force." Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 379 (1966).

76. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard*, 49 WASH. L. REV. 1, 45-46 (1973).

C. Dissenting Opinions

Justice Brennan, joined by Justices Douglas, Marshall and White, dissented in *DeFunis*. The dissent argued that the case was not moot because it was not certain that DeFunis would successfully finish his last quarter and graduate from law school. Justice Brennan argued that "unexpected events," such as "illness, economic necessity, [or] even academic failure" could preclude DeFunis from successfully completing his ninth, and final, quarter of law school studies, in which event, if the Supreme Court had dismissed the case as moot, DeFunis would have to petition for readmission, which the law school could deny.⁷⁷ Moreover, the dissent argued that *DeFunis* presented an issue of great public importance and that the Court could better serve the public interest by rendering a decision on the merits.⁷⁸

Only Justice Douglas proceeded further and offered an opinion on the merits. He concluded that the equal protection clause requires a state law school admission program to give consideration to each application "in a racially neutral way":⁷⁹

The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult manageable standards consistent with the Equal Protection Clause. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."

Moreover, Justice Douglas' "racially neutral" position was, in part at least, based upon his perception of the impact on minorities of any admission program that gave them a decisive preference on the basis of race:⁸⁰

77. 416 U.S. 312, 348 (1974).

78. *Id.* at 350.

79. *Id.* at 333-34, quoting *Loving v. Virginia*, 388 U.S. 1, 10 (1967). Douglas noted that if the Court were to permit racial preferences, it would be called upon to decide "which groups are to receive such favored treatment and which are to be excluded, the proportions of the [law school] class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group." 416 U.S. at 338.

80. 416 U.S. at 343. Douglas appears to have accepted much of the amicus curiae brief of the Anti-Defamation League of B'nai B'rith that was submitted by Professors Alexander Bickel and Philip Kurland. They argued that "a racial quota creates a status

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A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.

Yet, Justice Douglas refused to hold that law applicants must be admitted solely on a mathematically objective basis. Instead, he would allow each candidate to be evaluated "on the basis of [his or her] individual attributes" as measured by a racially neutral admission standard capable of being equally applied to each applicant.⁸¹

on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color or parental origin" and that:

[a] racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice. Though it may be thought here to help "minority" students, it can as easily be turned against those same or other minorities. The history of the racial quota is a history of subjugation not beneficence.

The evil of the racial quota lies not in its name but in its effect. A quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant, politically, economically and socially.

Brief for Anti-Defamation League of B'nai B'rith as Amicus Curiae at 31, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

81. *Id.* at 331-32. Douglas continued:

The Equal Protection Clause did not enact a requirement that Law Schools employ as the sole criterion for admissions a formula based upon the LSAT and undergraduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A Black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would not be offered admission because he is Black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that Black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. There is currently no test available to the Admissions Committee that can predict such possibilities with assurance, but the Committee may nevertheless seek to gauge it as best as it can, and weigh this factor in its decisions. Such a policy would not be limited to Blacks, or Chicanos, or Filipinos, or American Indians, although undoubtedly groups such as these may in practice be the principle beneficiaries of it. But a poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the committee.

Id. In a recent New York case, petitioner brought an action to compel a medical school to admit him, alleging that minority students with inferior credentials had

Since Justice Douglas did not believe that the record in *DeFunis* clearly showed whether the law school's special and separate evaluation of certain minority-group applicants gave them a decisive preference on racial grounds, or whether it merely served to compensate for the racial bias that he believed was inherent in other elements of the admissions standards, such as the Law School Admission Test (LSAT),⁸² he voted to vacate the judgment of the Washington Supreme Court and remand the case for a new trial on the issue.⁸³ Thus, six justices voted to vacate and remand; Justice Douglas also voting for a new trial.⁸⁴

III. UNIFORMITY OF CONSTITUTIONAL INTERPRETATION

Before analyzing the Washington Supreme Court's disposition of

been admitted. *Alevy v. Downstate Medical Center*, 78 Misc. 2d 1091, 359 N.Y.S. 2d 426 (Sup. Ct. 1974). The minority students were considered separately. "Screening in their respective cases, unlike that of applicants falling within the non-minority category, encompassed academic achievement in the light of attendant educational, financial and cultural disadvantage." 359 N.Y.S.2d at 428 (emphasis in original). The court held that petitioner had not been denied equal protection of the laws. Noting Justice Douglas' dissent in *DeFunis*, the court concluded that nothing in the record indicated that acceptance of minority students was based solely on race:

On the contrary, the testimony adduced in behalf of respondent is that a minority student whose low grades could not be attributed to financial and educational disadvantage would not be given the consideration shown to the disadvantaged. Furthermore, with respect to minority applicants, educational, cultural, economic background and probability of success in the program were considered.

Id. at 429. The court opined that admissions need not be based on a mathematical formula and that the factors which the school considered were proper. Even if the court had invalidated the admission of all the minority students, it concluded, it could not order petitioner's admission since he was too far down the waiting list. *Id.*

82. See note 81 *supra*. Existing evidence suggests that Justice Douglas is wrong in his belief that the LSAT and other standard predictors predict less validly for Blacks than Whites. To the extent that a difference, however slight, exists, the standard predictors appear to have greater, not lesser, validity for Blacks than Whites. W. SHRADER & B. PITCHER, *LAW SCHOOL GRADES FOR BLACK AMERICAN LAW STUDENTS* 530-35 (Educ. Testing Service Report 1973).

83. 416 U.S. at 344. This suggests that, given the time this procedure would require, Douglas believed it appropriate for the Court to decide whether *DeFunis* had a right to enter the law school long after he had graduated and had entered the practice of law.

84. Many persons interpreted the Court's refusal to decide the merits of *DeFunis*, together with Justice Douglas' dissenting opinion, as a "message to universities." *Editorial*, N.Y. Times, April 24, 1974, at 40, col. 2. Indeed, it appears that *DeFunis* has caused some university administrators to reconsider their admission policies. N.Y. Times, April 30, 1974, at 20, col. 1. Their actions may have been hasty if, as some scholars suggest, Justice Douglas' argument is "constitutionally unsound." See Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 967 (1974). The remand decision of the Washington Supreme Court, *DeFunis v. Odegaard*, 84

DeFunis on remand, it is necessary to understand the reason why the United States Supreme Court vacated the state court's judgment, rather than simply dismissing the appeal and allowing the state supreme court judgment to stand. The reason can best be elucidated by considering a 1952 case, *Doremus v. Board of Education*.⁸⁵ *Doremus* involved a challenge to the validity, under the United States Constitution, of a New Jersey law requiring that five verses of the Old Testament be read at the opening of each public-school day. The New Jersey Supreme Court held that the state statute did not violate the federal constitutional requirement of separation of church and state.

The action was brought by two plaintiffs, both citizen-taxpayers. One plaintiff had a daughter in the public school who had graduated when the appeal was before the Court. As to her interests, the Court held that the case was moot. That holding left only the citizen-taxpayer's interest, whose interest as a state taxpayer was held sufficient for standing by the state courts. Thus, the state supreme court reached the merits and rendered a decision on the substantive question of federal constitutional law presented. Nevertheless, the United States Supreme Court granted the state's motion to dismiss the appeal on the ground that the complaint failed to allege an unconstitutional invasion of an interest sufficient to sustain federal jurisdiction. The case was not a sufficiently "good-faith pocketbook action," under the prevailing test for federal taxpayer standing.⁸⁶

The *Doremus* Court neither reviewed nor vacated the state court judgment on the federal constitutional merits of the case. Thus, the Court let stand a state supreme court interpretation of the United States Constitution that could have been erroneous.⁸⁷ This conse-

Wn. 2d 617, 529 P.2d 438 (1974), although confusing in many respects, *see* text accompanying notes 94–109 *infra*, clearly failed to adopt Douglas' reasoning.

85. 342 U.S. 429 (1952).

86. In 1952, if the plaintiff's interest was solely that of a federal taxpayer, the doctrine of *Massachusetts v. Mellon*, 262 U.S. 447 (1923), would have denied standing. The current test requires the taxpayer to satisfy a two-pronged nexus test:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. . . . When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

Flast v. Cohen, 392 U.S. 83, 102–03 (1968). *Compare* *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970), with *Sierra Club v. Morton*, 405 U.S. 727 (1972).

87. The Court later held mandatory prayer reading unconstitutional in *School Dist. v. Schempp*, 374 U.S. 203 (1963).

quence is directly contrary to the critical doctrine of *Martin v. Hunter's Lessee*,⁸⁸ in which the Court declared that it must have the final power to review the merits of state court judgments on federal constitutional questions.⁸⁹

[If] there were no revising authority to control these jarring and discordant [state] judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation of efficacy, in any two states

The *Doremus* result has been strongly criticized on this ground:⁹⁰

[T]he Court should have gone the full way, holding that standing to raise a [federal] constitutional question is itself a federal question, that there was no standing and, therefore, the petition should stand dismissed in the state court and the decree vacated so that it would not be a precedent even in the state court.

The Court has since held that the question of whether it has federal jurisdiction is itself a federal question which, in light of the doctrine of *Martin v. Hunter's Lessee*, provides the Court sufficient jurisdiction to vacate and remand moot cases even though it may not have sufficient jurisdiction to reach and decide the merits of the case.⁹¹ Thus, the uniformity-of-interpretation policy of *Martin v. Hunter's Lessee* has been vindicated.⁹² This policy and its line of analysis explains why the Supreme Court vacated the state supreme court's judgment in *DeFunis*.

Under the rule as outlined above, reinstatement by the Washington Supreme Court of its previous decision would be clearly inappropriate, since its decision on the federal constitutional issue had been vacated. However, the Washington court could have reinstated its judgment and opinion so long as it restricted them to an interpretation

88. 14 U.S. (1 Wheat.) 304 (1816).

89. *Id.* at 348.

90. Professor Paul Freund in E. CAHN, *SUPREME COURT AND SUPREME LAW* 35 (1954).

91. See, e.g., *Garvin v. Cochran*, 371 U.S. 27 (1962); *Local 8-6, Oil Workers v. Missouri*, 361 U.S. 363 (1960); *DeFunis v. Odegaard*, 84 Wn. 2d 617, 624-25, 529 P.2d 438, 442-43 (1974); C. WRIGHT, *LAW OF FEDERAL COURTS* 34-45 (1970); R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* § 18.3 (4th ed. 1969); R. ROBERTSON & F. KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* § 273 (2d ed. 1951).

92. "[T]he gist of the question of standing [and mootness] . . . is, [now] of course, a question of federal law." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

of state constitutional law. Alternatively, the court could have simply vacated its judgment, leaving the constitutional question open for another day, or remanded and ordered a new trial on the question as suggested by Justice Douglas.⁹³

IV. THE *DEFUNIS* REMAND—STALEMATE

On remand, the actual response of the Washington Supreme Court was one of stalemate.⁹⁴ The only issue clearly disposed of was DeFunis' motion to convert his case into a class action.⁹⁵ The primary reasons given for the denial of DeFunis' motion were that, during oral argument before the United States Supreme Court, DeFunis' counsel "advised the court that this was not a class action"⁹⁶ and that DeFunis had successfully completed his final quarter of law school.⁹⁷ Accordingly, the court believed, he was removed from the class of applicants seeking law school admission; he was no longer "a real party in interest,"⁹⁸ nor was he a representative party who would fairly and adequately protect the interests of the class.⁹⁹

Disposition of the University's motion to reinstate the state supreme court opinion on the merits resulted in a stalemate. The four-justice plurality opinion ignored the uniformity-of-interpretation doctrine of *Martin v. Hunter's Lessee*¹⁰⁰ and again reached the merits of the case

93. It should be noted that, although Justice Douglas in his dissenting opinion voted to remand for a new trial, 416 U.S. at 343, the other five justices voting for remand stated in the per curiam opinion: "[T]he judgment of the Supreme Court of Washington is vacated, and the cause is remanded for such proceedings as by that Court may be deemed appropriate." *Id.* at 312. Thus, the Washington court was free to choose among the options noted in the text.

94. *DeFunis v. Odegaard*, 84 Wn. 2d 617, 529 P.2d 438 (1974).

95. DeFunis sought to avoid the mootness holding by filing a motion to convert the case into a class action and to reinstate the judgment of the Superior Court of King County. Plaintiff's Motion to Constitute Case a Class Action and Reinstate Judgment of Superior Court, *DeFunis v. Odegaard*, 84 Wn. 2d 617, 529 P.2d 438 (1974). The motion was denied by a 7-2 vote. Justices Finley, Wright and Brachtenbach concurred in that portion of a plurality opinion written by Justice Hamilton that was fully concurred in by Justices Stafford, Utter and Tuttle (Pro Tem.). *Id.* at 621, 529 P.2d at 441. Chief Justice Hale and Justice Hunter dissented from the decision on the class action issue. *Id.* at 635, 529 P.2d at 448.

96. *Id.* at 620, 529 P.2d at 440.

97. *Id.* at 621, 529 P.2d at 440-41. "Since the drafting of [the] opinion, [DeFunis] has successfully completed the bar examination and been duly admitted to the practice of law in the state of Washington." *Id.* at n.1.

98. *Id.* at 623, 529 P.2d at 442.

99. WASH. CIV. R. 23(a).

100. See notes 88-92 and accompanying text *supra*.

on the federal constitutional question.¹⁰¹ The plurality voted to reinstate the prior decision and judgment, relying on a state ground rejected by the United States Supreme Court in *DeFunis*,¹⁰² that the case fell "within that category of moot cases presenting a substantial issue of broad public import."¹⁰³

Presumably, the plurality's analysis, coupled with the denial of *DeFunis*' class action motion, serves to vest the Washington court with constitutional power to render advisory opinions on nonreviewable questions of federal constitutional law so long as the questions involve, as determined by the state court, substantial issues "of broad public import." The absurdity of this result is obvious. In dissent, Chief Justice Hale, joined by Justice Hunter, refused to reach the merits and voted only to grant *DeFunis*' class action motion on the somewhat naive belief that all "that needs be done [by the United States Supreme Court] to definitively resolve this issue is for this court to declare the obvious and grant *DeFunis*' motion to declare this to be a class action."¹⁰⁴

Justice Finley, joined by Justices Wright and Brachtenbach, wrote an opinion denying *DeFunis*' class action motion and the University's motion to reinstate the court's previous judgment, and refusing to reach the substantive merits of the case. Justice Finley recognized the import and continuing vitality of the *Martin v. Hunter's Lessee* doctrine.¹⁰⁵ Finley concluded that the "*DeFunis* litigation in its entirety should simply be rendered null and void . . . because the vacation [of the judgment on the federal question by the United States Supreme Court] simply nullified our state Supreme Court judgment and everything incorporated in it—including the trial court judgment."¹⁰⁶ Since the Washington court was left with no judgment at all on federal constitutional grounds, these three justices believed that the only proper

101. 84 Wn. 2d at 628, 529 P.2d at 444. This opinion reveals an ignorance of the doctrines of federal jurisdiction and of *Martin*. The plurality states:

[I]t would appear as a general proposition that when an appellate court determines that, because of mootness it lacks constitutional authority to rule upon a case, it no longer possesses jurisdiction to function upon the subject matter or litigants involved in that cause of action. Logically, then, it would appear more appropriate for an appellate court in that position to simply dismiss the appeal.

Id. at 624, 529 P.2d at 442.

102. 416 U.S. at 320.

103. 84 Wn. 2d 628, 529 P.2d at 444.

104. *Id.* at 644, 529 P.2d at 453.

105. *Id.* at 631–32, 529 P.2d at 446.

106. *Id.* at 633–34, 529 P.2d at 447–48.

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disposition was “simply [to] remand to the trial court with directions to dismiss the complaint.”¹⁰⁷

One must conclude that the Washington Supreme Court did not authoritatively reinstate either its previous decision, judgment or opinion since only four justices voted for this outcome.¹⁰⁸ For the same reason, Justice Finley’s three-vote opinion is not the law of the case, and, of course, neither is Chief Justice Hale’s two-vote dissenting opinion. Thus, strictly considered, there is no law of the case. The law school does not authoritatively know whether its racially-conditioned, affirmative action program in law admissions is constitutional, or whether it works an unconstitutional denial of equal educational opportunity. Because of mootness and stalemated confusion, the *DeFunis* courts have taken us back to square one. However, given its prior vote and opinion, if a similar case were litigated again, there appears to be a reasonably strong likelihood that the Washington Supreme Court would uphold the law school’s special admissions program.¹⁰⁹

V. CONCLUSION

Many definitions of the term “equal educational opportunity” have been set forth by scholars and judges. Some state courts are required by their constitutions to give affirmative content to the term. In contrast, the fourteenth amendment to the United States Constitution has been interpreted only as a limitation on state action rather than as the source of an affirmative duty to provide equal educational opportunity.

The question whether a law school’s racially-conditioned preferential admissions program unconstitutionally denies equal educational opportunity was presented in *DeFunis v. Odegaard*. Unfortunately, after more than 3 years of litigation, including decisions by the state

107. *Id.* at 634, 529 P.2d at 448.

108. See WASH. SUP. CT. ADMIN. R. 15(b): “Quorum. A majority of the justices hearing argument in a cause shall be necessary for a pronouncement of decision.” On remand, *DeFunis* was heard by nine justices.

109. If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken.

DeFunis v. Odegaard, 416 U.S. 312, 319 (1974).

and federal supreme courts, the question remains unanswered. The Washington Supreme Court upheld the University of Washington Law School's program only to have its decision vacated by the United States Supreme Court. Upon remand, a majority of the state supreme court was unable to agree on the proper disposition of the case.¹¹⁰ Although the law is unclear at this point, it is assumed that a similar case could reach the United States Supreme Court rapidly.

A trial court judge, faced with a federal equal protection challenge to the preferential admissions program of the law school, would be forced to conclude about *DeFunis* that: (1) the case establishes no precedent; (2) the case is res judicata between Marco DeFunis, Jr., and the University; and (3) the constitutional question is still open but should be treated in light of past events. (This includes, of course, a recognition that the Washington court previously rendered a decision, with opinion, on the substantive merits upholding the law school's preferential admissions program, although its judgment was vacated.) Thus, if in the future a trial court judge were confronted with a well-drafted complaint detailing the factual operation of the admission program and alleging a deprivation of equal protection of the laws, and if the judge believed he or she could render a fair and rational decision on the matter, one possible, and recommended, disposition would be to grant a university (defendant's) motion under Washington Civil Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. If the trial judge believes that more information about the factual workings of the admissions program than that supplied in the complaint is needed, and if the needed supporting factual affidavits were filed, another appropriate disposition would be to grant a university motion for summary judgment under Washington Civil Rule 56. Both of these dispositions have the merit of speed. Each requires full factual details about the operation of the admissions program. Each would quickly channel the substantial federal question through the state supreme court to the United States Supreme Court

110. On February 24, 1975, the University's Motion to Retax Costs was denied by the Washington Supreme Court. The Clerk of the Court reported:

The U.S. Supreme Court having vacated the opinion of this Court and having remanded the cause without deciding the issue, and this Court having reached no decision on remand, the case is closed and will not be remitted.

Letter from William M. Lowry, Clerk, Washington Supreme Court, to Honorable Slade Gorton, Attorney General, *et al.*, Feb. 25, 1975, on file at the Washington Law Review.

for authoritative resolution.¹¹¹ Another, but slower, appropriate disposition would be for the trial court judge to require a full trial of the case on its substantive merits. Unless the action confronting the trial judge were a class one (and perhaps even if it were not), this full-trial disposition, being slow, would run all the risks of failing to produce a definitive ruling on the merits by the United States Supreme Court, as did the inconclusive *DeFunis* case—an aborted *cause celebre*.

111. The state supreme court presumably would adhere to its former ruling. See note 109 *supra*.